

# The Indian

AMERICA'S UNFINISHED BUSINESS

XX

*Report of the Commission on the Rights,  
Liberties, and Responsibilities  
of the American Indian*

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non-members, appropriate money for general purposes, and administer justice through their own courts under codes of civil and criminal justice enacted by the tribal councils or promulgated in the regulations of the secretary of the interior or under customary law.<sup>27</sup>

Unlike the federal and state governments, however, there is rarely a separation of powers. The tribal council in many instances is the legislative as well as the executive branch, both passing and enforcing the laws. Some groups indeed carry the principle of unification to the point of having the council that serves as a legislative body act also as an appellate judicial body for decisions of a tribal court, mingling the functions in much the same way as do many United States administrative agencies.

The members of the council, either in their political capacity or as directors of a tribal corporation, also manage the common resources, determine what use the tribesmen may make of the collective land, lease tracts and minerals, and make other contracts relating to tribal activities. To finance their governments, a few groups tax merchants who do business within the reservation,<sup>28</sup> but most groups depend on income derived from common assets.

The Indian Reorganization Act illustrates how a law intended to strengthen Indian governments and to give the people responsible business experience through making their own decisions has in fact actually increased federal control over them. Prior to the passage of the statute a tribe generally had the inherent power freely to make its own laws and to spend any funds not in the possession of the federal Treasury.<sup>29</sup> Despite the fact that these rights and powers were in words confirmed by the Indian

<sup>27</sup> Cohen, *Handbook of Federal Indian Law*, chap. 7; *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89, C.A. 8 (1956); *Native American Church v. The Navajo Tribal Council*; *Williams v. Lee*; *Your Food Stores v. Village of Española*, 68 N.M. 327, 361 P. 2d 950 (1960), cert. den. 368 U.S. 915; 25 Code of Federal Regulations, chap. 11, cert. den. 358, U.S. 932.

<sup>28</sup> *Iron Crow v. Oglala Sioux Tribe*, 129 F. Sup.; *Barta v. Oglala Sioux Tribe*, 259 F. 2d 553, C.A. 8 (1958), cert. den. 358, U.S. 932.

<sup>29</sup> Opinion of the solicitor for the Dept. of the Interior, Oct. 25, 1934, on *Powers of Indian Tribes*, 55 Interior Department Decisions 14; V. Kappler, *Indian Affairs*,

## Tribal Governments

Reorganization Act, in actual practice every constitution adopted under the statute requires the secretary of the interior to review nearly all ordinances in various categories, notably those which define and punish offenses. Similarly, every Indian Reorganization Act corporate charter subjects to such approval almost the entire amount that a tribe can spend or make contracts for. And the same restrictions apply to many other groups not under this law.

This refusal to allow Indians to learn by trial and error may have had warrant in the 1930's at the time the first constitutions were adopted, for most tribes then had little knowledge of how to conduct a modern government and transact business in corporate form. Indeed, the corporate charters provided that the controls could be removed as the tribes gained experience, but in most instances the restraints still remain, continuing to be imposed when new charters are adopted.

This policy probably stems from the widespread belief among the B. I. A. staff that as "guardian" or "trustee," the Bureau itself must make the vital decisions. According to this notion, the United States could be sued for damages if the Indians made mistakes. However groundless this idea may be, it prevails and will continue to hamper tribal self-development until legislation or strong executive direction dispels the doubts of the Bureau employees.<sup>30</sup>

## Powers of Tribal Governments

Tribal government is, as has been seen, an integral part of the nation's political system, an evidence both of an unwillingness of the dominant race to exercise its power arbitrarily over these "first Americans"<sup>31</sup> and of a conviction that a people familiar

*Laws, and Treaties* (76 Cong., 2 sess., *Senate Doc. 194*), 778-808; "Indian Rights and the Federal Courts," *Minnesota Law Review*, Vol. XXIV (1940), 145; Cohen, *Handbook of Federal Indian Law*, chap. 7.

<sup>30</sup> See pages 132-34, Chapter Four below for a discussion of this point.

<sup>31</sup> In 1958, Premier Khrushchev, answering Bertrand Russell's plea that the United States and the Soviets should abandon their efforts to spread their creeds by force of arms, denied, of course, that the Soviets were guilty but charged us with driving "numerous brave Indian tribes, valiant hunters and peaceful farmers" into reservations and amusement parks and of imposing by force of arms

sons.<sup>28</sup> Where Indians comprise about one-twentieth of the population, they receive more than two-fifths of all the aid extended to dependent children.<sup>29</sup> In 1955 more than one-sixth of all individual incomes of the Navahos came from welfare or unemployment compensation.<sup>30</sup> The reliance on welfare payments for support is general among economically depressed minority groups.

### C. THE SHRINKING LAND BASE

The need for creating employment and developing Indian property is rendered more imperative by the fact that a growing reservation population is coupled with a diminishing land base. The B. I. A. estimated in October, 1960, that the United States had in its care about 52,398,565 acres (exclusive of Alaska), both tribal and allotted. This acreage represents what remains of the once vast Indian domain, the heaviest losses in recent times having occurred between 1887 and 1934, and during the 1950's (see Appendix, Table 3).

In 1958, James E. Murray, chairman of the Senate Committee on Interior and Insular Affairs, reported that:

During the past 4 or 5 years there has been grave concern over the increasing alienation of Indian lands from trust status . . . . The major apprehension is that decreases in Indian land base will seriously impair the effective use of Indian tribal and individual trust land in terms of economic land units.<sup>31</sup>

Accordingly, Senator Murray induced the secretary of the interior to declare a suspension of sales of Indian land while the Senate Committee studied the problem.<sup>32</sup> The investigation dis-

<sup>28</sup> Edward Threet, Report on Indian Welfare for the Commission on the Rights, Liberties, and Responsibilities of the American Indian (1960) (Commission files).

<sup>29</sup> "The Sioux, Our Unknown Neighbors," Sioux Falls (S. Dak.) *Argus-Leader*, June 2-20, 1957 (Anson Yeager series reprint).

<sup>30</sup> William H. Kelly, "The Changing Role of the Indian in Arizona," Agriculture Extension Service Circular 263 (Tucson, University of Arizona, June, 1958), 3.

<sup>31</sup> 85 Cong., 2 sess., *Indian Land Transactions*, Memorandum of the chairman to the Committee on Interior and Insular Affairs, *Committee Print.*, XVII (Washington, G.P.O., Dec., 1958).

<sup>32</sup> *Ibid.*, I.

closed (1) that an alarming amount of individual Indian land (2,595,414 acres) had been completely removed from trust status and government responsibility from 1948 to 1957, and (2) that the largest losses had occurred on reservations in areas containing the most allotments—those under the area offices of Billings, Muskogee, Minneapolis, and Sacramento (see Appendix, Table 3). An additional 421,000 acres had been taken for public purposes. The over-all shrinkage of 2,174,518 acres led Senator Murray to say:

. . . individual Indian trust land alienation is climbing at a potentially disastrous rate . . . . The magnitude of these removals raises a question as to whether the Indian Bureau has exercised its authority wisely in granting so many applications for sales and patents.<sup>33</sup>

There is substantial evidence that many Indians want to keep their land undivided, but there is also evidence to the contrary. For example, the Klamath people in Oregon voted in 1958 to fragment their holdings.<sup>34</sup>

The wisdom of allowing sales should be determined on the basis of whether a particular piece of ground contains needed water, could contribute to land consolidation, or could promote better use of the surrounding area for grazing. And in every case the final decision should rest with the tribe concerned.

### D. HEIRSHIP LAND AND TRIBALLY-OWNED LAND

The system of tenure determining ownership of Indian lands is immensely complicated. The terms "fractionated" and "fragmented" heirship apply quite accurately. For example, a single heirship case on the Wind River Reservation involved the interests of 104 heirs—Indians (enrolled and not enrolled, resident and nonresident, minors, competent and incompetent) and non-Indians, with seven unprobated estates which would eventually add twenty-two more heirs. It is not at all unusual for at least five persons to own interests in a single small tract of land.

<sup>33</sup> *Ibid.*, XVIII.

<sup>34</sup> *Klamath Tribune* (Chiloquin, Ore.), Vol. III, No. 4 (April, 1958), 1.

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Chiefly responsible for creating this situation were the General Allotment Act and similar laws, which provided that the federal government should divide tribally-owned land among tribal members, the United States to hold the plots in trust until the Indians gained the white man's sense of individual, private ownership. Unfortunately, the authors and proponents of such legislation failed to foresee that partitioning an owner's land following his death would often prove impractical. Indians may own parts of allotments in their own or other reservations, and for an heir to work a single tract, he needs the approval of all his fellow owners. Many times a tract is too small, too poor, or too arid for efficient use even in its undivided whole. Also, the patterns of inheritance of allotted lands are determined by state laws instead of by tribal laws. Furthermore, only under special circumstances can superintendents lease heirship land (25 U.S.C.A. 380). Therefore, the heirship system adds little to the Indian purse, but it does increase Indian economic problems and adds to the burden and expense of B. I. A. record-keeping.

The Indian Reorganization Act in 1934, as already noted, prohibited further allotments on the reservations to which it applies (48 Stat. 984); and executive orders extended the trust period in the case of tribes not adopting the Act.<sup>35</sup> But not even these measures prevented an increase in the number of heirs. The accompanying table indicates the heirship status of Indian-owned land.

Of the more than 6,000,000 acres in heirship status, about 1,500,000 are used by non-Indians; 45,000 are leased to the tribes; and about 500,000 lie idle, mainly because of the difficulty of making leases or of subdividing property among the owners.<sup>36</sup> One of the obstacles to leasing land was the limitation of the term of the lease, which has recently been extended, in some instances to ninety-nine years by Public Laws 86-326 and 88-167.

It is significant that on the San Carlos and the Navaho reserva-

<sup>35</sup> 86 Cong., 1 sess., *Indian Heirship Land Survey*, Part 1, Memorandum of the chairman to the Committee on Interior and Insular Affairs. *Committee Print*, U. S. Senate (Washington, G.P.O., Dec., 1960), 2, 3.

<sup>36</sup> *Ibid.*, Part 2, x.

## Economic Development

### HEIRSHIP STATUS OF INDIAN-OWNED LAND

Total heirship land (acres)	6,222,754
Number of tracts	40,787
<i>(approximately half of these tracts are owned by five or more heirs)</i>	
Type of land (acres):	
Irrigated	211,344
Dry Farming	869,037
Grazing	4,381,109
Forest	405,312
Other	209,225

tions, where the land was never allotted and is still almost all in one block, the members of both tribes make use of all the soil. In the Plains states, where the government-allotted land is owned individually and inherited according to state law, consolidation of land holdings requires a complicated and expensive court procedure and may be practicable only if carried out as an area-redevelopment project. In contrast to the complications developed by the allotment policy, Pueblo land that is still owned by the tribes and is under the administration of tribal governments can easily be consolidated into larger, economically useful, modern ranches. Proposed regulations of the secretary of the interior allow for consolidating 69,700 acres of tribally-owned land in central New Mexico. This is to be accomplished through the Bureau of Land Management, which can, with secretarial approval, exchange public lands within and without the reservations for non-Indian holdings, while the tribal councils can exchange their land with that of inholders.<sup>37</sup>

In contrast to the secretarial regulations used in consolidating tribally-owned tracts, complications flowing from the Allotment Act are too costly and too complex for one tribe alone to handle. A good example of an unsuccessful effort to combine heirship land is that of the Rosebud Sioux. In 1943 the Sioux Council

<sup>37</sup> Dept. of Interior news release, April 2, 1962.

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formed the Tribal Land Enterprise to purchase and merge land into economically profitable units (1,920 acres for grazing, or 480 acres for farming, or some combination of the two), and then to lease the land to tribesmen. Owners then received Tribal Land Enterprise certificates in exchange for property they turned over to the tribe to administer. When grazing fees or rents were collected each certificate holder received his proportionate share.

By 1959 a total of 312,668 acres—the majority purchased from single owners—were under Tribal Land Enterprise management, and only nine of the multiple-heirship tracts offered for sale had been purchased, since the tribe could not afford the excessive cost of clearing titles. Consequently, the effort to solve the heirship problem was of little account.<sup>38</sup> Spending money for consolidation of tracts may not be warranted in the case of tribes renting land to others that they themselves might use. In December, 1958, the B. I. A. granted the Rosebud Sioux half a million dollars for land purchases at a time when they were leasing 600,000 acres of tribal land to non-Indians.<sup>39</sup>

Many reservations will be unable to solve their economic problems until they can cure this evil of fragmented ownership. A bill known as the "Fractional Interests Act of 1966" has been introduced into Congress. House Record 11113 (September 16, 1965) provides that when trust or restricted allotment of Indian land, or a fractional interest therein held by a person after the date of this act is less than a specified amount, or the average net income accruing from the land is less than a certain sum, the land shall descend to one person who shall be a member of his family, the highest priority being given to the closest relative. In addition, a "Fractional Interests Acquisition Fund," to be established by the Treasury, shall be available for the secretary to use in purchasing interests from owners who desire to sell. If this bill passes, it may give the secretary of the interior sufficient latitude to attack the heirship problem.<sup>40</sup>

<sup>38</sup> Carl K. Eicher, "Constraints on Economic Progress on the Rosebud Sioux Indian Reservation," Ph. D. dissertation, Harvard University, 1960, pp. 93-95.

<sup>39</sup> *Ibid.*, 130.

<sup>40</sup> As of October 15, 1965, hearings had not been held on *House Report 11113*.

## Economic Development

### Present Uses of Natural Resources

Indians with adequate capital and training often lack the experience necessary to make commercial use of their own lands (through farming, ranching, mineral, or timber operation—whatever the area offers), and even if heirship-land problems were solved and irrigation improved, indications are that only approximately one-half of the reservation Indian families could obtain incomes comparable to those realized from similar white ventures.<sup>41</sup> At the present time, however, resources have not been developed to anything like their full capacity.

Indians are presently using less than half of their irrigated farmlands and only about three-fourths of their rangelands, with the remainder either being leased to non-Indians or left idle. In 1961 the B. I. A. estimated that on major reservations, totaling about 1,129,464 acres, approximately 378,000 acres not then in use could have been developed for irrigation.<sup>42</sup>

Even agricultural Indians like New Mexico Pueblos are abandoning farming. Indians are lured from using their arable lands fully by ready and "easy" money offered by nearby employers or white renters, insufficient funds to purchase machinery, develop water, or expand acreage for better cultivation, or by inadequate training in handling larger units. Additional deterrents include high production costs, lack of credit, marketing competition from chain stores, absence of personal encouragement, and the bitter contrast between the hard life of the "small" farmer and the relatively easy life of the wage worker. These influences are exerted upon all small-scale farmers—Indians and non-Indians alike. The B. I. A. has been attempting to enlarge the size of farming units in the Río Grande Valley. In the early days, when land was plentiful, Pueblo Council officials assigned tribally-owned surplus land to newly married couples, a use right that continued in the family. Individuals thus acquired a vested interest in the holdings, which upon their death were divided

<sup>41</sup> Dorner, "The Economic Position of the American Indians," 286-88.

<sup>42</sup> Communications from Evan L. Flory, chief, Branch of Land Operations, B. I. A., Washington, to Professor Peter Dorner, Feb. 6, 1962.